

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MERRILL LYNCH CREDIT CORPORATION</b>	:	DETERMINATION
	:	DTA NO. 818834
for Revision of a Determination or for Refund	:	
of Real Estate Transfer Tax Under Article 31	:	
of the Tax Law.	:	

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Petitioner, Merrill Lynch Credit Corporation, 4802 Deer Park Lake Drive East, Jacksonville, Florida 32246-8277, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law.

On June 21, 2002 and July 3, 2002, respectively, petitioner, by its representative Craig G. Biscone, Esq., and the Division of Taxation by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel), waived a hearing and agreed to submit the subject matter for a small claims determination based on documents and briefs to be submitted by October 19, 2002, which date began the three-month period for the issuance of this determination. After due consideration of the documents and arguments presented, Dennis M. Galliher, Presiding Officer, renders the following determination.

***ISSUE***

Whether petitioner's request for a conciliation conference to challenge a Notice of Determination assessing real estate transfer tax was filed in a timely manner.

***FINDINGS OF FACT***

1. The Division of Taxation (“Division”) received from petitioner, Merrill Lynch Credit Corporation, via its attorney, Craig G. Biscone, Esq., a letter dated July 18, 2001 requesting a conciliation conference to challenge a Notice of Determination identified as Assessment ID No. L-019263097-1. The letter identifies petitioner by its Taxpayer ID No., and the envelope in which the letter was mailed bears three date stamps. The earliest is a machine metered postmark indicating Bayside, New York and bearing the date July 18, 2001. The next mark, which in part overlays the machine metered postmark, is a United State Postal Service (“USPS”) postmark indicating Long Island, New York and bearing the date July 20, 2001. The final mark is the receipt stamp of the Division’s Bureau of Conciliation and Mediation Services (“BCMS”) indicating Albany, New York and the date July 23, 2001. The envelope indicates, on its face, that it was mailed by certified mail. The record does not include the receipt for certified mailing from which additional date stamp information might be gleaned.

2. The record includes a copy of the challenged Notice of Determination. This notice is addressed to petitioner, Merrill Lynch, at 4802 Deer Lake Drive East, Jacksonville, Fl. 32246-6484. In its upper right corner the Notice bears, *inter alia*, the following information:

Document Number: 00016744

Date: 04/20/01

Assessment ID: L-019263097-1

An attached one-page explanation and computational sheet indicates that the notice assesses additional real estate transfer tax due in the amount of \$7,000.00, based upon disallowance of petitioner’s claim of a deduction for a continuing lien, plus penalty (per Tax Law § 1416[b]) and interest.

3. By a Conciliation Order Dismissing Request (CMS No. 187861) dated August 3, 2001, BCMS advised petitioner that its request for a conciliation conference was denied. Specifically, the Order advised that the notice was issued on April 20, 2001, but that the request was not mailed until July 20, 2001, thus leaving the request as untimely since it was mailed more than 90 days after the issuance of the notice.

4. Petitioner challenged this denial, as well as the underlying merits of the assessment, by filing a petition with the Division of Tax Appeals.<sup>1</sup> The petition included and made reference to a letter from petitioner, dated September 25, 2001, which provides, with respect to the timeliness of petitioner's request for a conciliation conference, as follows:

Receipt is hereby acknowledged with respect to your denial of a conciliation conference. I must appeal your dismissal inasmuch as I find it to be in error. My letter was dated July 18, 2001 and was within the ninety day filing period. You stamped it "Rec'd" on July 23, 2001 and claim that it was not mailed until July 20, 2001 being 91 days after the original notice was issued. This conclusion ignores the reality that the letter was produced on July 18<sup>th</sup> and deposited in a postal depository box on July 19<sup>th</sup> after pick-up hours and thus postmarked on July 20<sup>th</sup>, which was in fact the 91<sup>st</sup> day after the notice was given. As an aside, even the CPLR allows five days for mailing.

5. In support of its position that the request was untimely, the Division submitted the affidavits of Geraldine Mahon and Daniel LaFar, employees of the Division, as well as a copy of the certified mail record ("CMR") containing a list of the notices of determination allegedly issued by the Division on April 19, 2001.

6. The affidavit of Geraldine Mahon, principal clerk of the Division's Case and Resource Tracking System ("CARTS"), sets forth the Division's general procedure for preparing and mailing notices of determination. This procedure culminates in the mailing of the notices by

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<sup>1</sup> The parties were advised by a letter dated June 10, 2002 that only the threshold jurisdictional issue of the timeliness of petitioner's protest, but not the underlying merits of the protest, would be addressed in this proceeding.

USPS certified mail and confirmation of the mailing through the receipt and retention of a postmarked copy of the CMR.

8. The computer-generated notices of determination are accompanied by a CMR entitled “Assessments Receivable, Certified Record for Non-Presort Manual Mail.” The notices are predated with their anticipated date of mailing, while the CMR is dated in its upper left corner with the actual date of its printing, in this case April 10, 2001. The difference between the anticipated mailing date for the notices and the printing date of the CMR is to ensure that there is sufficient lead time for the notices to be manually reviewed, and thereafter processed for postage and fees by the Division’s mechanical section prior to mailing. In this case, consistent with the Division’s procedure, the CMR printing date of April 10, 2001 has been lined through and the date “4/19/01” has been handwritten immediately above to indicate and confirm April 19, 2001 as the date of mailing. Ms. Mahon’s affidavit states the following:

It should be noted that the statutory notice was dated 4/20/01, one day after the actual date of mailing of 04/19/02, to allow ample time for manual review before mailing. This actually allowed the taxpayer 91 days to file a protest rather than the 90 days provided by statute.

9. A certified control number is assigned to each notice listed on the CMR, and such number is recorded on the CMR under the heading “Certified No.” The CMR for the block of notices issued by the Division’s Real Estate Transfer Tax Unit on April 19, 2001 is a one-page document. In this instance, the one-page CMR is labeled “Page 2” in the upper right corner of the CMR. The record does not include page one. However, Ms. Mahon avers as follows:

All notices targeted for manual review are printed in one computer run, with each page of the run numbered consecutively. Each unit which has selected notices for manual review receives a separate and complete certified mail record for their notices. In this case, the notices selected for manual review by the Real Estate Transfer Tax Unit were printed on page 2 of the computer run. Page 2 contains 10 entries.

10. In April 2001, it was a regular practice for notices of determination to be received from CARTS by the personnel in the Division's Real Estate Transfer Tax Unit and to be manually reviewed, together with the accompanying CMR. After the notices were reviewed for accuracy, a clerical staff person put the notices into individual windowed envelopes, the CMR was then wrapped around the envelopes and the envelopes and CMR were sent to the Division's Mail Processing Center for postage and mailing.

11. There are ten certified numbers on the CMR for April 19, 2001. The certified control number 7401 1002 9739 0013 1749, corresponding to the entry listing petitioner's name, Merrill Lynch, address, 4802 Deer Lake Drive East, Jacksonville, FL 32246-6484, and Notice Number, L-019263097, is found on the CMR.<sup>2</sup> The CMR is date stamped April 19, 2001 by the Colonie Center branch of the USPS in Albany, New York. At the bottom of the page, the number "10" has been circled as the "Total Number of Pieces Listed," beneath which appear the initials of the postal employee to verify the receipt of 10 pieces of certified mail by the USPS.

12. The affidavit of Daniel LaFar, Chief Mail Processing Clerk in the Division's Mail Processing Center ("mailroom"), attests to the regular procedures followed by his staff in the ordinary course of business of delivering outgoing mail to branch offices of the USPS. More specifically, after a piece of correspondence, including a statutory notice, is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the mailroom staff operates a machine which weighs and seals each envelope and places postage and fee amounts thereon. A mailroom clerk then checks the first and last pieces of mail listed on the CMR against the information contained on the CMR, and also performs a random review of 30 or fewer pieces of

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<sup>2</sup> The portions of the CMR which pertain to taxpayers other than petitioner have been redacted to preserve the confidentiality of those other taxpayers.

certified mail by checking the information on the envelopes against that appearing on the CMR. Thereafter, a member of the staff delivers the stamped envelopes to the Colonie Center branch of the USPS in Albany, New York. A postal employee affixes a postmark and his or her initials or signature to the CMR indicating receipt by the post office. Mr. LaFar's knowledge that the postal employee circled the number "10" on the CMR and initialed the same page to indicate the receipt of 10 pieces of certified mail is based on the fact that the Division's mailroom specifically requested that the postal employees either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. The CMR is the Division's record of receipt, by the USPS, for the pieces of certified mail listed on the CMR. In the ordinary course of business and pursuant to the practices and procedures of the Division's mailroom, as followed in this case, the CMR is picked up at the post office by a member of Mr. LaFar's staff on the following day after its delivery and is then delivered to the originating office within the Division (here CARTS).

### ***CONCLUSIONS OF LAW***

A. Tax Law § 1411(a) provides, in part, as follows:

If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the commissioner of taxation and finance from such information as may be obtainable, including the assessed valuation of the real property or interest therein and other appropriate factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after the giving of notice of such determination, shall petition the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of the commissioner's own motion shall redetermine the same.

Tax Law § 1419(a) provides:

Any notice authorized or required under the provisions of [Article 31] may be given by mailing the same to the person for whom it is intended in a

postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provision of this article or in any application made by him, or in any instrument evidencing the conveyance which is the subject of the notice, or, if no return has been filed or application made, or address stated in the instrument, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice.

Tax Law § 1419(b)(1) provides, in relevant part, as follows:

If any return, claim, statement, notice, application, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of [Article 31] is, after such period or such date, delivered by United States mail to the commissioner of taxation and finance, bureau, office, officer or person with which or with whom such document is required to be filed, or to which or to whom such payment is required to be made, the date of the United States postmark stamped on the envelope shall be deemed to be the date of delivery. This subdivision shall apply only if the postmark date falls within the prescribed period or on or before the prescribed date for the filing of such document, . . . .

B. Pursuant to the foregoing statutory sections, the Division's determination "shall finally and irrevocably fix the tax" unless the person against whom it is assessed files a petition with the Division of Tax Appeals seeking revision of the determination within 90 days of the mailing of the notice. Alternatively, Tax Law § 170(3-a)(a) allows a taxpayer to file a request for a conciliation conference with the Division's BCMS following the issuance of a Notice of Determination so long as the time to petition for a hearing in respect of such notice has not elapsed. Pursuant to these provisions, then, petitioner had 90 days from the issuance of the subject notice to file a request for a conciliation conference with BCMS or a petition with the Division of Tax Appeals.

C. Where a taxpayer fails to file either a timely request for a conciliation conference or a petition contesting a Notice of Determination, the Division of Tax Appeals has no jurisdiction over the matter and is statutorily precluded from hearing the merits of the case, (*see, Matter of Sak Smoke Shop*, Tax Appeals Tribunal, January 6, 1989; *Matter of Roland*, Tax Appeals Tribunal, February 22, 1996). There is no claim that a petition was filed at any time within 90 days after issuance of the notice in this case. The only issue presented, then, is whether the mailing of petitioner's July 18, 2001 letter requesting a conciliation conference was within 90 days after the issuance (mailing) of the Notice of Determination.

D. As set forth above, it is the mailing date of the statutory notice which triggers the 90-day period within which a protest must be filed (Tax Law § 1419[a], [b][1]). Where, as here, a taxpayer files a request, but the timeliness of the request is at issue, the Division bears the burden of proving proper mailing of the statutory Notice of Determination (*Matter of Novar TV & Air Conditioning Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991; *Matter of Katz*, Tax Appeals Tribunal, November 14, 1991). A statutory notice is mailed when it is delivered to the custody of the USPS (*see, Matter of Air Flex Custom Furniture*, Tax Appeals Tribunal, November 25, 1992). When a notice is found to have been properly mailed by the Division, a presumption arises that the notice was received by the person to whom it was addressed (Tax Law § 1419(a); *see, Engel v. Lichterman*, 95 AD2d 536, 467 NYS2d 642, 643, *affd* 62 NY2d 943, 479 NYS2d 188; *Matter of Katz, supra*). However, the "presumption of receipt" does not arise unless or until sufficient evidence of mailing has been produced and, as noted, the burden of demonstrating proper mailing rests with the Division (*see, e.g., Matter of Ruggerite, Inc. v. State Tax Commission*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). In turn, the mailing evidence required of the Division in order to establish proper mailing is two-



fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed in this particular instance (*see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra*).

E. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Ms. Mahon and Mr. LaFar, Division employees involved in and possessing knowledge of the process of generating, reviewing and issuing (mailing) statutory notices. Furthermore, the Division has offered adequate proof to establish the fact that the particular notice at issue was actually mailed to petitioner on April 19, 2001, the date appearing on the CMR. The affidavits generally describe the various stages of producing and mailing notices and, in addition, attest to the authenticity and accuracy of the copies of the notice and the CMR submitted as evidence of actual mailing. These documents establish that the general mailing procedures described in the Mahon and LaFar affidavits were followed with respect to the notice issued to petitioner. Petitioner's name and address, as well as the Assessment ID number on the face of the notice in issue, appear on the CMR which bears a USPS date stamp of April 19, 2001. There are 10 certified mail control numbers listed on the CMR, and the USPS employee who initialed the CMR indicated, by circling the number "10" near his initials, that he received 10 items for mailing. In short, the Division established that it mailed the notice of determination to petitioner by certified mail on April 19, 2001 (*see, Matter of Auto Parts Center*, Tax Appeals Tribunal, February 9, 1995).

F. While it has been established that the notice was in fact mailed, by certified mail, on April 19, 2001, the Division admits that the printed date on the face of the notice is April 20, 2001, or one day later. Consequently, the Division has measured the 90-day limitations period

for filing a protest from such later date. This treatment recognizes the fact that a taxpayer, who is initially without any knowledge of the actual date on which a notice was mailed by the Division, might be misled and reasonably rely, without fault and to its detriment, on the date printed by the Division on the face of a statutory notice as the triggering date for the period of limitations on filing a request for a conciliation conference or a petition. It would be fundamentally unfair to hold a taxpayer to such an earlier actual mailing date when the face of the notice indicates a later date, as in this case. Accordingly, notwithstanding that the notice was actually mailed on April 19, 2001, the commencement date for the period of limitations on filing a request or a petition under the facts of this case shall be April 20, 2001. In turn, in order to be considered timely, any protest against the notice had to have been filed within 90 days thereafter, or by July 19, 2001.

G. Conciliation Order No. 187861 denied petitioner's request for a conciliation conference on the basis that the request was not filed within 90 days after the issuance of the underlying statutory Notice of Determination. Pursuant to Tax Law § 1419(b)(1), it is the USPS postmark which is controlling for purposes of determining the timeliness of the request. In this case, the request (petitioner's letter dated July 18, 2001) was not filed until it was mailed on July 20, 2001, as borne out by the USPS postmark showing such date, and thus the request was not timely filed (i.e., within 90 days after April 20, 2001). Petitioner asserts that the letter was mailed when it was placed in a USPS depository box on July 19, 2001, after hours, and simply was not postmarked until April 20, 2001, the 91<sup>st</sup> day. Unfortunately, such method of mailing provides no objective evidence to bear out the allegation that the mailing in fact occurred on July 19<sup>th</sup>, as asserted. Petitioner chose the method of mailing its protest and, as a consequence, bears

the risks associated therewith, including the risk that a postmark may not be affixed so as to establish that mailing of the protest occurred within the requisite time period.<sup>3</sup>

H. The petition of Merrill Lynch Credit Corporation is hereby dismissed.

DATED: Troy, New York  
January 9, 2003

/s/ Dennis M. Galliher  
PRESIDING OFFICER

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<sup>3</sup> It is noteworthy that while the envelope in which the request letter was mailed indicates that it was mailed by certified mail (*see* Finding of Fact “2”), the receipt for such mailing was not provided.